UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ANTHONY J. CRESSON, Appellant, v. DEPARTMENT OF THE AIR FORCE, Agency.	DOCKET NUMBER CH07528610115 DATE: APR 3 1987

Robert D. Zitko, Esquire, Worthington, Ohio,
for the appellant.

Gail D. Reinhart, Esquire, Wright Patterson AFB, Ohio,
for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Dennis M. Devaney, Member
Member Devaney dissents in a separate opinion.

OPINION AND ORDER

The Department of the Air Force petitions for review of the initial decision issued March 28, 1986, that reversed the agency's action removing appellant. For the reasons discussed below, the Board GRANTS the agency's petition. 5 U.S.C. § 7701(e). The initial decision is REVERSED. The agency's action removing appellant is SUSTAINED.

BACKGROUND

The agency removed appellant from his position as a payroll supervisor for excessive absenteeism. Following a work-related disagreement with his supervisor on November 17,

1983, appellant did not report to work the following day and did not attempt to return to duty until September 24, 1984. Although appellant made no direct contacts with the agency regarding his leave or his condition, every two weeks he forwarded certificates to the agency from his physician which stated that he was disabled for work. The agency placed appellant on annual and sick leave, and when his leave was exhausted, the payroll system automatically converted appellant's status to Leave Without Pay (LWOP).

The agency wrote to appellant requesting additional medical documentation for his absence and requesting a prognosis for recovery. The agency's letters were returned unclaimed, and on March 5, 1984, after carrying appellant on LWOP for thirty days, he was placed on AWOL. On April 6, 1984, the agency issued a letter of proposed removal charging appellant with excessive absenteeism. The letter was sent by certified mail and was returned unclaimed.

On May 8, 1984, the agency issued its decision removing appellant effective May 10, 1984. The letter, sent certified mail, was returned unclaimed. The agency continued to receive medical certificates from appellant's physician until September 24, 1984, when he attempted to return to duty. At that time, appellant was advised that he had been removed May 10, 1984.

The appellant appealed to the Board's Chicago Regional Office. In an initial decision issued January 31, 1985, the administrative judge dismissed the appeal as untimely filed.

In a June 11, 1985 Order, the Board reversed the initial decision and remanded the appeal for a hearing on the merits. *See Cresson v. Department of the Air Force*, 27 M.S.P.R. 665 (1985). The Board found that the agency was dealing with the appellant's attorney after it became aware that mail sent to the appellant was not delivered and before it effected the appellant's removal. The Board, therefore, found that the agency's actions to effect delivery of the notices were not sufficient to charge the appellant with constructive delivery, and thus, the appellant did not have notice of his removal until September 24, 1984. On this basis, the Board concluded that the appellant had demonstrated good cause for filing his petition for appeal on October 18, 1984, within a reasonable time after he received actual notice.

In a second initial decision, issued March 28, 1986, the administrative judge, relying on the Board's findings in its remand order, reversed appellant's removal, finding that the agency had failed to provide appellant with required notice that leave would no longer be approved and failed to order appellant back to work before taking disciplinary action.[1]

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[1] Appellant's case was originally docketed CH07528510034 by the Board's Chicago Regional Office in October, 1984. However, on remand from the Board, the appeal was dismissed without prejudice based on appellant's unavailability for hearing due to health problems. Appellant's motion to reinstate his appeal was granted on December 5, 1984, and was assigned docket number CH07528610115.

Issue

Whether the agency made sufficient efforts to provide appellant with notice that his leave requests were inadequately supported and that it would no longer approve leave before removing him for AWOL?

ANALYSIS

The agency's efforts to provide appellant with notice that his leave requests were inadequately supported before removing him for AWOL were sufficient for the reasons set forth below.

1. An employee has primary responsibility for requesting and supporting leave requests.

First, we note that the administrative judge's conclusions are premised on her assumption that the Board's June 11, 1985 Order, which found that the agency had failed to achieve proper service of its removal of appellant, required a similar result in this case regarding notice of his leave status. We disagree.

An agency is required by statute to provide an employee with notice of an adverse action. However, it is not charged with the same requirement regarding an employee's leave status. Rather, it is the employee who is responsible for requesting leave and providing the agency with the necessary supporting medical documentation. *See Dunn v. U.S. Postal Service*, 9 M.S.P.R. 652, 655 (1982) (agency employee's unavailability for duty in position as letter carrier, by reason of injuries allegedly sustained in automobile accident, without any foreseeable end to his absence, warranted removal, particularly in view of facts that the agency had made several

attempts to reach employee and *it was his responsibility to keep his employer informed concerning his availability for work)* (emphasis added); *See also Barner v. U.S. Postal Service*, 11 M.S.P.R. 357, 361 (1982) (agency is under no obligation to approve leave unless it is requested and supported by a valid basis); *Nunes v. E.E.O.C.*, 13 M.S.P.R. 428, 431 (1982) (agency was not required to tolerate employee's prolonged absence, relative to alleged medical condition, which had no foreseeable end, particularly in view of employee's deliberate refusal to contact his supervisor).

Although the agency did not hear from appellant, it allowed him to exhaust his leave, and then accepted the doctor's certificates as a request for LWOP. However, because many of the certificates listed no reason for appellant's absence and others made a general reference to "stomach problems" and because the agency had insuffficient information regarding his condition or prognosis for recovery, it did not carry appellant in LWOP status longer than thirty days.[2]

In addition, appellant's evidence at the Board hearing regarding his incapacity during the AWOL period does not provide a basis for voiding the agency's decision to carry appellant in an AWOL status and thereafter to remove him for

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2 The agency declined to carry appellant in continuation of pay (COP) status after have being advised by the Office of Workers' Compensation (OWCP) that he should be carried in annual or sick leave status rather than COP status. Moreover, appellant's OWCP claim had already been denied three months before his request for COP and LWOP.

excessive absenteeism. *See Zeiss v. Veterans Administration*, 8 M.S.P.R. 15, 18 (1981) (Board sustained a removal based upon an AWOL charge because appellant did not furnish requested medical information, nothwithstanding a psychiatrist's testimony that the appellant was unable to work during the AWOL period) *See also Bentley v. U.S. Postal Service*, 20 M.S.P.R. 208, 210 (1984)(an employee's absence "for which there is no foreseeable end in sight" is a burden which no agency is required to bear).

In summary, we find that appellant did not request leave, the medical certificates he submitted to the agency failed to provide a sufficient medical basis for his absence, and there was no forseeable end to his absence. Thus, the agency established by preponderant evidence that it acted properly in exercising its discretion by placing appellant in an AWOL status and thereafter removing him for excessive absenteeism. *See Bavier v. Department of Transportation*, 4 M.S.P.R. 548, 550 (1981) (agency's obligation to support its decision by preponderance of the evidence extends to every element of its charges, including propriety of a decision to deny leave); *Desiderio v. U.S. Department of the Navy*, 4 M.S.P.R 84, 86 (1980) (authorization of LWOP is a matter of administrative discretion, and employees cannot demand that they be granted LWOP as a matter of right).

2. Appellant was already aware of leave procedures and the documentation necessary to support a leave request by virtue of his position as a payroll supervisor.

Appellant had been employed by the agency as a payroll supervisor for almost fourteen years. His responsibilities included leave approval and recording and he had expertise in leave regulations. Thus, appellant was aware of his responsibility to make leave requests, the documentation which must support such requests, and the necessity for keeping the agency apprised of the estimated length of an anticipated absence. Because appellant was aware of leave requirements, it was error for the administrative judge to order appellant's removal cancelled on the basis of the agency's inability to notify appellant that he was required to keep the agency advised of his availability for work.

3. Appellant evaded the agency's efforts to contact him regarding his leave status.

Appellant did not keep the agency advised of his status, and his actions made it impossible for the agency to contact him. He did not provide the agency with any telephone number or address at which he could be reached, nor did he make any attempt to contact the agency personally. In addition, appellant's physician testified at the Board hearing that the reason he did not respond to the agency's request for assistance in contacting appellant was because appellant had not authorized him to release any information. We may reasonably infer from this that appellant's physician discussed his receipt of the agency's March 4, 1984 letter requesting additional medical documentation with appellant at the time, and that the appellant must have known that the agency was trying to contact him. Finally, it appears

incredible, in the absence of instructions from their father, that appellant's daughters, who received a letter and telegram for appellant regarding his leave status, would have told the agency that they would not forward their father's mail in the absence of instructions from appellant.

4. The agency's failure to communicate with appellant's attorney regarding his leave status was not error where the appellant failed to submit designation forms authorizing the release of such information.

Although the Board, in its previous order, found that the agency was obligated to communicate with appellant's attorney regarding his leave and the proposed action, the Board made the ruling without benefit of the hearing evidence. That evidence indicated that, at the time the action was proposed and effected, the agency was not authorized to communicate to the person purporting to be appellant's attorney regarding appellant's leave status or his removal. The agency advised the attorney in its April 17, 1984 letter, that it had not received the designation of representative form from appellant. See 5 C.F.R. § 297.201(b)(3). At the time the agency effected appellant's removal, it was three weeks after it had advised the attorney that it could not release any personnel information to her in the absence of a designation form.

Moreover, the designation form filed by appellant's attorney more than two weeks after the agency's removal action was effected, expressly limited the representation and the release of information to appellant's OWCP claim. Thus, even

if the agency had held its final decision on appellant's removal in abeyance until it heard from appellant's attorney, the form would have been insufficient authorization for the agency to communicate to appellant's attorney on any issue other than his OWCP claim. *Id.*

5. The agency did not commit harmful error by allowing appellant to use his sick and annual leave before placing him on LWOP and AWOL.

Having found the AWOL charge supported by preponderant evidence, we now address appellant's affirmative defense that the action cannot be sustained because the agency placed him on annual and sick leave without his authorization. We find no merit to appellant's allegation that the agency committed harmful error by carrying him on annual and sick leave without his consent resulting in the exhaustion of his accrued leave. As noted by the agency, such action, even if error, was not harmful because the agency's only other alternative would have been to place appellant on AWOL in light of OWCP's instructions to the agency that he should not be carried on LWOP or COP. See *Baracco v. Department of Transportation*, 15 M.S.P.R. 112, 122 (1983), *aff'd*, 735 F.2d 488 (Fed. Cir. 1984) (reversal of action warranted only where procedural error, whether regulatory or statutory, likely had a harmful effect upon the outcome of the case before agency).

6. The removal penalty was reasonable.

Finally, notwithstanding appellant's thirty-five years of federal service and the absence of a prior disciplinary record, we find that the removal penalty was within the

parameters of reasonableness. *See Davis v. Department of the Treasury* 8 M.S.P.R. 317, 320 (1981) (in determining the propriety of a penalty for an employee's conduct, the Board will not freely substitute its judgment for that of the agency, but will only assure that managerial judgment has been properly exercised within tolerable limits of reasonableness). In this regard, we note that appellant was a supervisor in an office charged with the enforcement of the very policy and procedures which he violated; the agency demonstrated the adverse impact and disruption appellant's absences had on its operation; and it established that removal was consistent with its table of penalties (which allowed removal after an absence of only ten calendar days). *See Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305 (1981).

ORDER

Accordingly, the initial decision is REVERSED, and the agency's action removing appellant is SUSTAINED. This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113.

NOTICE TO APPELLANT

The appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review, if the Court has jurisdiction, of the Board's action by filing a petition for

review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the Court no later than thirty (30) days after you or your representative receives receipt of this order.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.

OPINION OF BOARD MEMBER DENNIS M. DEVANEY
DISSENTING FROM THE OPINION AND ORDER

Contrary to the implication in the majority opinion, I believe the Administrative Judge correctly interpreted the Board's remand order in this case. Since I participated in that remand decision, I feel most comfortable with my position. I believe the Administrative Judge's decision is correct and I would affirm by short-form opinion.

March 31, 1987
Date

Dennis M. Devaney
Member

Washington, D.C.